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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC., *Petitioner,*

v.

PHILCO CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A of Petition) is reported at 17 Pike & Fischer R.R. 2054. The memorandum opinion and order of the

Federal Communications Commission (Appendix B of petition) is reported at 15 Pike & Fischer R.R. 965.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Where the Federal Communications Commission grants the renewal of a broadcast license without holding a hearing, does a party who alleges that the grant has caused it substantial economic injury have standing to seek a hearing under Section 309(e) of the Communications Act to show that the grant is violative of the public interest, convenience and necessity?

STATUTES INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.*, are Sections 309(e) and 402(b), pertinent portions of which are set forth in Appendix C of the Petition.

STATEMENT

This proceeding originated with the application of the National Broadcasting Company (NBC) for renewal of certain broadcast station licenses in Philadelphia, Pennsylvania. The Federal Communications Commission (Commission), without a hearing on the applications, granted the license renewals on a conditional basis. Philco Corporation (Philco), invoking Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. 309(e), filed a protest against these renewal authorizations on the grounds that they were improperly made and otherwise contrary to the public

interest. (R. 5-27) The protest contained detailed allegations of fact substantiating this claim, and sought a full evidentiary hearing upon the following issues (R. 26-27):

"1. To determine whether the past history of antitrust litigation and trade practices of RCA and of NBC, RCA's wholly owned subsidiary, and the current practices of both as revealed by pending litigation, by Congressional inquiry, by the Commission's own files, and otherwise, adversely reflect on NBC's character qualifications to own and operate this broadcast station in the public interest.

"2. To determine whether the renewal of the said license results in an undue concentration of control of the media of mass communication in the Greater Philadelphia area inconsistent with the public interest, convenience and necessity and contrary to Section 3.636 of the Rules of the Federal Communications Commission.

"3. To determine whether the renewal of the said license, taken together with the ownership and control by NBC of media of mass communication, and affiliation therewith, both within and outside of the Greater Philadelphia area, results in an undue concentration of control of such media inconsistent with the public interest, convenience and necessity and contrary to Section 3.636 and 3.658 of the Rules of the Federal Communications Commission.

"4. To determine whether, in view of the evidence adduced under the foregoing issues, the renewal of the license of WRCV-TV, Philadelphia, to NBC will serve the public interest, convenience and necessity."

Philco's protest also contained allegations of fact which showed it to have suffered direct and substantial

economic injury as a result of this grant and claimed that such economic injury made it a "party in interest" with standing to protest under Section 309(c). The facts alleged include the following:

> Philco is in direct competition with RCA as a manufacturer and the grant of this station to NBC strengthened RCA's competitive position to such a degree as to cause substantial direct economic injury to Philco (R. 6). NBC's ownership of the Philadelphia station aids RCA in its competition with Philco by broadcasting preferential programming featuring RCA and by giving RCA certain advertising advantages (R. 7-9). These preferential practices, which Philco and other competitors of RCA can not hope to obtain by however large an expenditure, constitute the grossest and most harmful variety of unfair competition (R. 9). RCA's monopolization in the field of research, patent acquisition, holding and licensing in radio and television as charged by the U. S. Government and others is seriously detrimental to Philco as a manufacturer, and NBC is directly instrumental in expanding the adverse effects of RCA's practices through ownership and operation of its Philadelphia station (R. 8-9). Certain practices of NBC in operating its Philadelphia station, such as option time abuses and "must buy" requirements, seriously injure Philco as an advertiser since these devices render sponsorship of network programs in the preferred listening period prohibitively expensive and deprive Philco of any vestige of choice as to the markets in which it wishes to concentrate sponsored program television advertising (R. 10-11).

By memorandum opinion and order (R. 74-91), the Commission dismissed Philco's protest on the ground that Philco was not a proper party in interest to bring these matters to the attention of the Commission.[1]

Philco appealed to the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b). The petitioner, NBC, intervened in that appeal. The lower court determined that Philco's protest contained allegations of fact which showed that the renewal of the station licenses in question cause Philco substantial economic injury and, therefore, that Philco did have the requisite standing to advance the public interest issues before the Commission. The Commission's order dismissing the protest was reversed and the case was remanded for further proceedings. Judge Madden dis-

[1] The Respondent believes, and so contended in the lower court, that the Commission's dismissal of its protest was also based upon another separate ground, i.e., that Philco's public interest allegations, if proven, were not sufficient to require a denial of the renewal applications. Before the Court of Appeals, the Commission insisted that its dismissal of the protest was based upon the standing question only and that other language in its opinion was gratuitous and of no decisional effect. The lower court agreed with the Commission and limited the scope of its review as follows:

> "Our question is only whether Philco has standing by filing a protest to advance reasons which might influence the Commission in making a decision in the public interest with respect to the renewals. Indeed, assuming such standing we are not now concerned even with the sufficiency of Philco's protest to warrant a hearing, a question not yet passed upon by the Commission." (Appendix A of Petition, p. 3a)

Since the petition for certiorari concerns only the question of Philco's standing as a party in interest, the Respondent will similarly limit the scope of this opposition.

sented from this decision (Appendix A of Petition, pp. 6a-8a). The dissent does not disagree with the holding of the majority that Philco's protest contained allegations of fact showing it to have suffered economic injury as a result of license renewals in question. Despite this, however, the dissenting judge would deny Philco's right to protest since, in his view, the allegations of economic injury were "unrelated to the subject which was regulated by the [Commission]."

ARGUMENT

In its efforts to avoid a hearing on the vital public interest issues raised in Philco's protest, NBC has filed a petition for a writ of certiorari which discloses no important public question not already settled by this Court and various courts of appeal; nor does the petition reveal any conflict between the decision of the lower court and any other federal court decision.

Instead, the petitioner attempts, without supporting authority, to impose a new standard for determining whether a party has sufficient standing to file a protest under Section 309(e) of the Communications Act challenging a grant in the public interest. The petition makes no claim that the decision below conflicts with any other decision on the same matter of law and fact; rather, it strains to show an inconsistency in application of general principles.

Actually, the lower court's decision is based upon a strict application of the well-established legal test regarding standing. It is perfectly consistent with the long line of previous decisions on this subject and is manifestly correct.

I.

The Public Question Presented by This Case Has Been Authoritatively Settled by This Court and the Decision Below Is Clearly Correct

The question presented to and decided by the court below was whether the allegations of Philco's protest were sufficient to qualify it as a "party in interest" within the meaning of Section 309(e) of the Communications Act. This question involves no novel principles of law. The requirements necessary for standing to advance public interest issues before an administrative tribunal have been authoritatively established by this Court and consistently applied by various courts of appeal and administrative agencies.

The landmark decision in this field is *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). In this case the court held that "one likely to be financially injured by the issue of a license" has standing "to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license" (309 U.S. at 477).

The Congress, in enacting Section 309(e), expressly adopted as the definition of "party in interest" the standard set forth in the *Sanders* decision. As stated in the Senate Report on the bill:

> "... 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders case (309 U.S. 470)." S. REP. No. 44, 82d Cong., 1st Sess., 8 (1951).

The "likelihood of economic injury" test has been consistently followed by the courts and was strictly applied by the court below. After restating the principle that a person likely to be economically injured

by an authorization of the Commission has standing to bring to the Commission's attention errors of law it committed in making the grant, the court examined the allegation of the protest. It found that these allegations showed not only that Philco *was likely* to be injured, but that it had *actually* been injured by the protested grant. Once this determination had been made the court's conclusion was inevitable since this is the only test which need be met by a "party in interest." The court therefore held that Philco has standing "to file its protest, and, if the protest is found legally sufficient, to advance the alleged anti-trust and other practices for consideration by the Commission in passing upon the renewal applications."

The petitioner seems to recognize that the authorities have uniformly considered likelihood of economic injury as the test in cases involving standing. However, it is argued that something more is required in the present case. In addition to alleging economic injury as a result of the grant, the petitioner would require that Philco meet what can only be characterized as an occupational test. Philco is variously described in the petition as "not even a member of the 'industry at large'", and as having "no interest in the broadcasting business" (Petition, p. 10). This unique theory of limiting standing to members only is highly discriminatory and fortunately was not the test adopted by Congress. Economic injury hurts regardless of a person's occupation and Congress, wisely, did not attempt to discriminate between those so injured.

The petitioner cites no authority for its unusual proposition but rather seeks to infer its validity from the fact that in many cases dealing with standing the aggrieved party was also engaged in an industry regu-

lated by the agency whose order was contested. Aside from the fact that legal principles are not so coincidentally established, the cases relied upon by the petitioner offer no support for such a thesis. Rather, they are based solely on the injury inflicted and not the occupation of parties.[2] Also, of course, there are many important cases where the persons granted standing were not subject to the regulatory powers of the agency. *City of Pittsburgh* v. *Federal Power Commission*, 99 U.S. App. D.C. 113, 237 F. 2d 741 (the City of Pittsburgh and certain barge operators); *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 211, 225 F. 2d 511 (a newspaper publisher); *Associated Industries* v. *Ickes*, 134 F. 2d 694 (consumers of coal); *Reade* v. *Ewing*, 205 F. 2d 630 (a consumer of oleomargarine).

The Federal Communications Commission, which is charged with the responsibility of determining in the first instance whether a protestant is a proper party in interest, has expressly rejected the petitioner's theory. In *Ohio Valley Broadcasting Corp.*, 10 Pike & Fischer RR 452, 455, the Commission stated:

> "[N]either Section 309(e) of the Act, the Sanders decision nor subsequent decisions stemming therefrom limit persons entitled to standing to object to agency action to those engaged in the same type

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[2] For example, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, *supra*, standing was allowed solely on the basis of the economic injury alleged by the appellant. The court explained: "Congress may have been of the opinion that *one likely to be financially injured* . . . would be the only person having sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." 309 U.S. at 477. (Emphasis added.)

> of business engaged in by the beneficiary of the agency action complained of."[3]

On appeal, the court concurred in the Commission's determination with respect to the protestant's standing. *Clarksburg Publishing Co.* v. *Federal Communications Commission, supra.*

Above all, the argument is just not relevant to the facts of this case. Philco is "engaged in the same type of business engaged in by the beneficiary of the agency action complained of." The protest clearly sets out that Philco as an electronics manufacturer is in direct competition with RCA and that RCA is the beneficiary of the grant complained of. Even the petitioner recognizes that no distinction should be made between RCA and NBC in determining the ownership of the station in question. (See page 14 of Petition, where advertising benefits inuring to RCA are justified as the normal industry practice of the identification of the *station owner.*)

The petitioner attempts to justify its adoption on the ground that the administrative tribunals and courts will otherwise become overburdened and clogged. This concern of NBC is evidently not shared to the same degree by the tribunal which would be affected, since it is noted that the Commission has not sought the review of this Court in these proceedings. Of course, there is no cause for the alarm which the petitioner proclaims. The tired argument that standing

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[3] Section 402(b) of the Act is also irreconcilable with petitioner's theory. That section authorizes appeals "*by any other person* who is aggrieved or whose interests are adversely affected." (Emphasis added.) The language is broad and it is clear that the only standard is whether a person is aggrieved.

to challenge invalid administrative orders should be drastically limited so that the tribunals will not be overworked shows a complete disregard for the public interest, the protection of which is the purpose of such proceedings. Such an argument was laid to rest by Judge Frank's well-reasoned opinion in *Associated Industries* v. *Ickes, supra.* In that case the court held that hundreds of thousands of coal consumers had standing since they met the established test of economic injury. Warned that such a holding would result in impairing the effective administration of the statute involved, the court replied:

> "There are no such horrendous possibilities. A review proceeding must be brought within sixty days after the entry of the Commission's order and only in one of the Circuit Courts of Appeal. . . ." 134 F. 2d at 707.

The procedural safeguards under Section 309(c) of the Communications Act are even more apparent. Protests of grants made without a hearing must be filed within thirty days of the order. Significantly, the Act does not set down the protest for a hearing, but rather specifies that it is the *application* for the grant which is designated for hearing. Thus, a particular grant can be subject to but one hearing regardless of the number of protests filed.

It is apparent that the allegations in the protest showed, *inter alia*, that the license renewals gave to RCA a substantial preferential advantage over Philco. The advantages so obtained involved advertising preferences in a medium which is known to have an extraordinary impact on the public. The court recognized that such a preferential competitive advantage was economically injurious to Philco. Applying the

established legal principle involved, it concluded that Philco had standing as a party in interest. Clearly, the decision is eminently correct and the petitioner's arguments are without substance or authority.

II.

There Is No Conflict of Decisions

There is no claim by the petitioner—and of course there could not be—that the lower court's decision is directly conflicting with the holding of any other decision on the same matter of law and fact. Rather, the petitioner asserts that the opinion of the lower court is somehow inconsistent with the "principles" established in various other appellate decisions. In Part 2 of its petition the petitioner switches its attack, and apparently accepts the legal standard which it had previously claimed to be insufficient. Here it challenges the court's interpretation of the facts. The gist of this second approach is found in the general statement (Petition, p. 12): "The injury Philco asserts, if it exists at all, does not result from the Commission's action here in any realistic sense."

That NBC should so interpret Philco's allegations is not surprising. However, it is not the interpretation adopted by the Court of Appeals. The court examined the allegations of economic injury set forth in Philco's pleading and found that Philco had alleged injury both as an advertiser and as a manufacturer in competition with NBC's sole stockholder, RCA. The court found it unnecessary to consider the injuries alleged by Philco in its capacity as an advertiser, i.e., a consumer, since it concluded that there was sufficient basis for Philco's standing in the economic injury it claimed as a manufacturer. In so concluding, the court

was satisfied that even the Commission's characterization of Philco's allegations in this regard met the necessary requirements.[4]

The petitioner takes great pains to distinguish the facts presented in this case from those in other standing cases. It need not try so hard. Most cases differ in their factual setting to some degree. The important indistinguishable fact in all of these cases, however, is that each of the parties granted standing had alleged a likelihood of economic injury.

In grasping for straws, the petition makes much of the fact that the lower court's opinion limited its holding to the case which is was deciding.[5] This of course

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[4] Philco's actual allegations showed aggrievement of a far more substantial and direct nature than is contained in the Commission's summary of those allegations. While Philco does not agree that the Commission's summary which the court incorporated into its decision is completely accurate, it does agree with the court's conclusion that even this version of the alleged facts showed sufficient injury as a result of the grant to give it standing.

[5] An even more striking example of straw-grasping is seen in the imaginative interpretations which the petitioner finds hidden in an order of the court changing the wording of the opinion as originally issued to insert the words "a preferential" for the article "an" in one of its sentences. The speculative arguments indulged in by the petitioner are interesting, but, perhaps unfortunately, this minor amendment can be more logically attributed to such a mundane reason as a stenographer's error or a proofreader's haste. The sentence, as corrected, reads: "Our decision gives standing to a competitor in the position of Philco only to protest a renewal after it is known that licensed facilities are being used by the competing manufacturer directly to obtain a preferential economic advantage over the protestant." In substance, the insertion of the word "preferential" might be considered unnecessary. It does, however, more accurately describe Philco's allegations, and leaves no room for doubt that such an advantage is injurious.

is only commendable appellate practice. To "leave other situations for other cases" is only proper and lends strength to the decision rendered instead of creating confusion in attempting to cover too broad an area. While it seems unnecessary to repeat, the fact remains that the court decided simply that Philco had standing under Section 309(e) because it was economically injured by the grant in question.

We come now to the cases which the petitioner claims are in clear conflict "in principle" with the decision below. *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. 2d 303 (D.C. Cir., 1938) is cited as a case involving broadcast licensees "held to lack standing to challenge Commission action even though they had far more substantial and immediate interests than Philco has here" (Petition, p. 15). An examination of this case, however, reveals nothing of the kind. Involved were appeals by three radio station licensees contesting an order of the Commission allowing another station to change its frequency and increase its power. The appeals were denied for lack of standing. The reason was clear. The court stated that the appellants had not made any claim "under 402(b)(2) that they will suffer financial or economic injury, loss of patronage, or loss of listening audience" (98 F. 2d at 305). This would seem to prove only that one must claim aggrievement in order to be considered aggrieved. One of the appellants in this case did make a charge that the Commission's grant would result in electrical interference. The court disposed of this as follows: "As to this charge the evidence unmistakably shows that the operation of Waterbury . . . will not interfere with Pittsburgh . . ." (98 F. 2d 305-06). The conflicting principles are not apparent.

The petition also refers to *WOKO, Inc.* v. *Federal Communications Commission*, 109 F. 2d 665 (D.C. Cir., 1939), a case which was dismissed by the Court of Appeals not because the appellant lacked standing but because the appellant had alleged no facts to show that the Commission's order was contrary to the public interest. There is language in the opinion of the court to the effect that the injury alleged to give standing would not be sufficient "unless it also appeared that, as a result of such injury, the public interest, convenience, or necessity would suffer" (109 F. 2d at 668). While this language was unnecessary to the actual holding of the case, the reasoning of the court has been discredited in later cases, as the petitioner points out (Petition, p. 15, Note 12).

The majority opinion in the case below was careful to avoid the erroneous dicta of the *WOKO* decision. The dissent, however, is predicated upon it. As the majority so clearly and correctly stated: "Of course the public considerations advanced by such a party, as distinct from the reasons which gave rise to standing, must stand on their own feet under the criteria which govern the Commission in passing upon the merits of the applications" (Petition, Appendix A, p. 5). The courts have been consistent in adhering to this principle, and to the extent that the *WOKO* decision, Judge Madden's dissenting opinion, and the petitioner's argument are inconsistent they are clearly erroneous.[6]

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[6] In this regard, it is apparent from Judge Madden's dissenting opinion that he misconceived the purpose of Section 309(e) as well as the content of Philco's protest. He stated (Petition, Appendix A, p. 8): "The problem is really the broad one of whether a radio or television network should be permitted to be owned by

In *Mansfield Journal Co.* v. *Federal Communications Commission*, 173 F. 2d 646 (D.C. Cir. 1949), the appellant seeking standing to challenge the grant of a station license was merely an applicant for a construction permit "which it may never obtain" (173 F. 2d 647-48). Appellant's likelihood of injury was completely dependent upon its being successful in acquiring this permit. In its existing state it could never be injured by the grant. This is clearly distinguishable from the present case, where Phileo was actually injured by the grant and the likelihood of future injury was not dependent upon any subsequent event.

KFAB Broadcasting Co. v. *Federal Communications Commission*, 177 F. 2d 40 (D.C. Cir. 1949), is similar in its holding to the *Mansfield Journal* case, *supra*. At the time the order appealed from in that case was entered by the Commission, the appellant was not aggrieved by it and did not so claim. Subsequently another action of the Commission caused the appellant to seek a reversal of the first order. The court held:

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the owner of any other business. . . . So long as such ownership is permitted, it would seem absurd to conclude that the owner could not advertise over his own facilities, though his competitors could do so." This implies that it is necessary for a protestant's aggrievement to be the result of some illegal or prohibited action. Of course this is not the case. There is nothing inherently illegal about the addition of a radio station to a community, yet the addition might very likely injure an existing station. *FCC* v. *Sanders Bros. Radio Station*, *supra*. In fact the injury giving rise to standing is more often the result of perfectly legal action on the part of the grantee than not. The question of standing must be considered apart from the public interest issues raised by a protestant. "[T]he mere fact that . . . [a party] will suffer . . injury from the operation of the . . . station entitles him to demand a hearing. . . ." *Camden Radio* v. *Federal Communications Commission*, 94 U.S. App. D.C. 312, 318, 220 F. 2d 191, 196 (1955).

> "[T]hat a person not aggrieved or affected by an order when it is entered, does not become aggrieved or affected by that order, within the meaning of this statute, upon the happening of some subsequent event, which changes his status." 177 F. 2d at 42.

This again is in no way similar to Phileo's claim of aggrievement.

Southwestern Publishing Co. v. *Federal Communications Commission*, 243 F. 2d 829 (D.C. Cir. 1957), simply stands for the proposition that the person seeking standing as a party in interest must itself be aggrieved. Thus, a company which sought standing was held not to satisfy the standard, since the alleged injury ran to a different company which was the actual "party in interest."

Clearly, in these cases the standard established by the *Sanders* decision was not met. The legal principles applied by the courts were identical to those applied by the lower court in this case. There is no conflict in the principles. The only difference is that Philco was injured by the grant in question while the parties in the cases just cited were not.

The petitioner also claims that if Philco is aggrieved it is not because of the grant by the Commission, but rather, because of the activities of the licensee. Again, this is not a new argument. As stated in *Greenville Television Co.* v. *Federal Commun. Com'n*, 95 U.S. App. D.C., 314, 316, 221 F. 2d 870, 872 (1955):

> ". . . the economic injury that gives standing, under Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S. Ct. 693, 84 L. Ed. 869, 1037, to oppose Commission action, is seldom if ever a direct result of Com-

mission action. Even the grant of a new station license does not automatically take advertising revenue away from existing licensees, but only creates a situation in which the new licensee may be able to get the revenue by private negotiation, yet existing licensees are 'adversely affected' and 'parties in interest'."

Similarly, in *Camden Radio* v. *Federal Communications Commission*, *supra*, 220 F.2d 191, at 195, the court held that the appellant was a party in interest "entitled under §309(c) of the Act to protest and be heard, when he alleges he will suffer economic injury *from the operation of the new station.*" (Emphasis added.)

It is splitting hairs to claim that an administrative order is not injurious, but that the effectuation of the order is. To seek such hair-splitting from this Court is certainly not a ground for the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY B. WEAVER, JR.
QUINN O'CONNELL
1225 19th Street, N. W.
Washington 6, D. C.

Attorneys for Respondent

Of Counsel:

1225 19th Street, N. W.
Washington 6, D. C.

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